Supreme Court No. 80496-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TERRANCE TERRIEL POWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald Culpepper, Judge

REPLY BRIEF OF APPELLANT

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STATUTES, RULES AND OTHER

A. ARGUMENT IN REPLY

1. UNDER RCW 9.94A.537, UNLESS THE DEFENDANT WAS SERVED WITH NOTICE PRIOR TO TRIAL, A TRIAL COURT DOES NOT HAVE AUTHORITY TO IMPANEL A JURY TO CONSIDER AGGRAVATING CIRCUMSTANCES AFTER REVERSAL OF AN EXCEPTIONAL SENTENCE IMPOSED BY A JUDGE.

The state provides three reasons to support its claim that RCW 9.94A.537 authorizes the impaneling of a jury to try aggravating factors on remand after an exceptional sentence is reversed, even where the state gave no notice prior to the original trial and sentencing that it would seek to prove aggravating factors. Those three reasons are: (a) the notice requirement of 9.94A.537(1) is not mandatory; (b) RCW 9.94A.537(1) and (2) operate independently of one another; and (c) a reading of .537(1) and (2) together renders section (2) meaningless. Brief of Respondent (BOR) at 4-5. These reasons should be rejected because they are not supported by a plain reading of the statute.

First, RCW 9.94A.537(1) is nonmandatory only in the sense that the state does not have to seek an exceptional sentence in every case. The permissive "may" refers to the right of the state to give notice at any time up to trial, if the rights of the defendant are not prejudiced, of its intent to seek an exceptional sentence; it does not mean that the state can choose

to either give notice or not. Notice it is clearly mandatory if the state wishes to seek an exceptional sentence.

> At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

This Court's holding in State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007), that RCW 9.94A.537(1) precluded a trial on aggravating circumstances for cases that had already gone to trial or had a plea entered, would make no sense if the notice requirements of subsection (1) were optional. This Court said that since Pillatos and Butters had already "pleaded guilty, the statute, by its terms, does not apply to them." Pillatos, 159 Wn.2d at 471.

Second, as set out in the Opening Brief of Appellant (AOB), at 4-5, RCW 9.94A.537(1) and (2) are not independent provisions, but the first two of six obviously interrelated subsections. The subsections are not connected by "or" and address different, but essential, aspects of exceptional sentencing. Subsection (1) sets out the due process requirement of notice; (2) authorizes the court to impanel a jury if a new sentencing hearing is required after reversal of an exceptional sentence imposed by

a judge; (3) sets out the right to a jury determination of facts supporting an aggravating factor; etc. The due process right to notice of what the state will have to prove in order to convict and punish, set out in subsection (1), is no less important than the right to a jury trial and proof beyond a reasonable doubt set in subsections (3) and (6). Section (1) should apply in every case.

Third, harmonizing these provisions, as the rules of statutory construction require, does not render subsection (2) meaningless. City of Seattle v. Fontainilla, 128 Wn.2d 492, 498, 909 P.2d 1294 (1996). There could very well be, and likely are, cases in which the prosecution gave notice prior to trial or plea of an intent to seek an exceptional sentence. Such notice might, in fact, have been given in order to encourage a guilty plea just as threats to add counts are sometimes given to encourage plea bargaining. See Bordenkircher v. Hayes, 434 U.S. 357, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978).

In any event, the plain and unambiguous requirements of the statute dictate that all sections of RCW 9.94A.537 should be read together and not independently of one another. Such plain and unambiguous requirements should not be construed to reach a contrary result. BOR at

6 (conceding that plain and unambiguous language should not be construed beyond the meaning of the words in the statute).

The state argues, nevertheless, that the statement of legislative intent accompanying the 2007 amendments to .537 compels an interpretation of sections (1) and (2) as alternatives even though such an interpretation is contrary to the plain language of the statute. BOR at 6. This argument should be rejected. Broad statements of intent do not impeach or add to a statute's unambiguouis operative language. State v. Delgado, 148 Wn.2 723, 727-730, 63 P.3d 792 (2003); State v. Smith, 144 Wn.2d 665, 672, 30 P.3d 1245 (2002). And, most importantly, the statement of intent in this case indicates that the legislature was addressing the holding of this Court in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), "that the changes made to the sentencing reform act concerning exceptional sentences in chapter 69, Laws of 2005, do not apply to cases where the trial had already begun or guilty pleas had already been entered prior to the effective date of the act." RCW 9.94A.537(1) is part and parcel of the changes in chapter 68, Laws of 2005, which the legislature in its 2007 statement intended to make applicable to convictions which were already entered through trial or plea. The notice requirement must apply equally with the other provisions.

The legislature's further statement that "[t]he legislature intends that the superior court shall have the authority to impanel juries to find aggravating circumstances in all cases that come before the court for trial or sentencing, regardless of the original trial or sentencing," does not negate the notice provisions of section (1) either. It indicates, in fact, that the statute should apply equally to all cases. It does not provide that those charged before the effective date of the statute have fewer rights.

Even if the statement of intent were intended to be remedial, such a remedial statement would not apply retroactively to overrule a prior construction of the statute by this Court. Pillatos, 159 Wn.2d at 473 (citing Overton v. Econ. Assistance Auth., 96 Wn.2d 552, 558, 637 P.2d 652 (1981), and Johnson v. Morris, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976)).

The plain and unambiguous words in .537 require that notice be provided prior to trial or a plea in all cases; the notice requirement set forth in section (1) is not waived when section (2) is applicable.

2. NOTICE OF AGGRAVATING FACTORS IS NOT ONLY STATUTORILY REQUIRED, IT IS CONSTITUTIONALLY MANDATED.

The state's argument that the prosecution is not required to provide before-trial notice of the aggravating factors it seeks to prove at trial is

based on authority that is neither applicable nor helpful to its position. The issue of whether the Indictment Clause of the Fifth Amendment applies to the states through the Fourteenth Amendment is not relevant to the issue of whether the Sixth Amendment and Article 1, § 22 require notice of aggravating factors.[1] BOR 12-23. Mr. Powell is not arguing that he was entitled to indictment by a grand jury under the Fifth Amendment; he is arguing that he has a due process right to notice of "the nature and cause" of the accusations against him. Sixth Amendment; art.1, § 22.

Second, the state's assertion that "with the exception of one state, every other state has rejected that Blakely's right to a jury trial on aggravating factors also requires the State to allege the aggravating factor in the indictment or information," is misleading at best. The majority of the cases the state cited clearly support the conclusion that pre-trial notice of aggravating factors *is* required. Most of the cases cited at 15-16 and note 4, are death penalty cases in which the courts held that giving notice of aggravating factors in a separate notice of intent to seek the death penalty was sufficient and that the aggravating factors did not also have to be alleged in the indictment or information. McKaney v. Arizona, 100 P.3d 18 (Ariz. 2004); Terrell v. State, 276 Ga. 34, 572 S.E.2d 595 (Ga. 2002);

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[1] Contrary to the arguments of the state, n.3, Mr. Powell has clearly raised the issue under both the state and federal constitutions.

Soto v. Commonwealth, 139 S.W.3d 827 (Ky. 2004); Berry v. State, 882 So.2d 157 (Miss. 2004); State v. Gilbert, 103 S.W.3d 743 (Mo. 2003); Primeau v. State, 88 P.3d 893 (Okla.Crim.App. 2004); State v. Sawatzky, 125 P.2d 722 (Or. 2005); State v. Berry, 141 S.W.3d 549 (Tenn. 2004).[2]

In State ex.rel. Smith v. Conn, 98 P.3d 881, 884 (Ariz. 2004), the court granted the state the right to add an aggravating factor in the indictment, and held that "the notice the state seeks to give here regarding aggravating factors is necessary to both put a defendant on notice of the maximum sentence he may receive and to have the jury consider those factors so that, in the event of conviction, the trial judge may impose a sentence which complies with Blakely." In State v. Everette, 616 S.E.2d 237, 242 (NC 2995), a non-capital case, the court agreed that while it was not error in the particular case not to allege the aggravating factors in the charging document, "any fact which increases the maximum penalty must be charged in the indictment."

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[2] In Stallworth v. State, 868 S.2d 1126 (Ala. 2003), the court held in a capital case that the state did not have to allege aggravating factors, relying on a prior decision holding that sentencing enhancements did not have to be alleged. Such a holding is contrary to well-settled law in Washington. State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980). In Bottoson v. Moore, 833 S.2d 693 (Fla. 2002), the court held that aggravating factors did not have to be alleged in an indictment; the opinion did not provide any analysis.

In other death penalty cases cited by the state, the courts held that the aggravating factors did not have to be alleged because the charge itself gave rise to notice that death could be imposed. People v. Davis, 793 N.E.2d 552 (Ill. 2002) (noting that the indictment did contain the allegations of aggravating factors); Baker v. State, 790 A.2d 629 (Md. 2002); Floyd v. State, 42 P.3d 249 (Nev. 2002); Russeau v. State, 171 S.W.2d 871 (Tex. 2005).[3]

The difficulty in relying on capital cases is illustrated by State v. Yates, 161 Wn.2d 714, 758, 168 P.3d 359 (2007), where this Court held that aggravating factors are not elements of the crime and therefore the information did not have to charge the elements of the robbery during the course of which the murder was alleged to have been committed or to define "common scheme or plan." The Yates decision, however, relied on the fact that the information plainly charged "aggravated first degree murder," thus giving notice of the penalties to which the defendant could be subjected. Here, although Mr. Powell was initially charged with and acquitted of aggravated murder, he was never subsequently charged with any crime which would justify a sentence above the top of the standard

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[3] In Morrisette v. Warden of Sussex State Prison, 613 S.Ed.2d 551 (Va. 2005), the court held that the defendant was not entitled to notice of the aggravating factors in a capital case as long as the information gave adequate notice of the "nature and character" of the charge.

range. Moreover, this Court in Yates did not hold that notice of the specific statutory aggravating factors relied on to support the charge of aggravated murder could be left out of the information.

In point of fact, every federal circuit court which has considered the issue has held that statutory aggravating factors under the Federal Death Penalty Act, to which the Fifth Amendment clearly applies, must be found by a grand jury and charged in the indictment, even though the statute does not provide for indictment on aggravating factors. United States v. LeCroy, 441 F.3d 914 (11th Cir. 2006). While the Indictment Clause has never been made applicable to the states, the suggestion that this fact weighs against a requirement that aggravating circumstances be alleged in the charging document should not be well-taken. Federal authority supports the proposition that aggravating factors must be charged as well as proven to the jury.

The authority cited by the state upholds the failure to include aggravating circumstances in the charging document only because the defendant has clear notice of the aggravating factors in another pleading. Even the cases which hold that no notice of aggravating factors must be given, do so because, under the state's capital punishment statutes, the

charge of the underlying crime itself gave notice that death could be imposed.

Third, the state cites cases from this Court construing the Persistent Offender Accountability Act (POAA) which, in contrast to the aggravating factors in support of exceptional sentences, do not require any proof to a jury; this Court has consistently held that a sentence of life without parole under the POAA is dependent only on prior convictions and exempted by Apprendi from the Sixth Amendment's requirments.[4] BOR 17-118, 21-23. See e.g., State v. Thorne, 129 Wn.2d 736, 921 P.2d 415 (1996).

Fourth, the state ignores the holding and analysis of the United States Supreme Court in Washington v. Recuenco, ___ U.S. __, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006), where the United States Supreme Court held that the failure to submit a firearm enhancement to a jury could be harmless error because, for Sixth Amendment purposes, enhancement is equivalent to an element of the crime:

> Accordingly, we have treated sentencing factors, like elements, as facts that have to be tried to the jury and proved beyond a reasonable doubt. The only difference between this case and Neder is that in Neder the prosecution failed to prove the element of materiality to the jury beyond a reasonable doubt, while here the prosecution failed to

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[4] The state also relies on pre-Apprendi authority. e.g., State v. Clark, 129 Wn.2d 805, 920 P.2d 187 (1996); State v. Lei, 59 Wn.2d 1, 365 P.2d 609 (1961).

> prove the sentencing factor of "armed with a firearm" to the jury beyond a reasonable doubt. *Assigning this distinction constitutional significance cannot be reconciled with our recognition in Apprendi that elements and sentencing factors must be treated the same for Sixth Amendment purposes.*

Recuenco, 126 S. Ct. at 2553 (emphasis added).

In Gautt v. Lewis, 489 F.3d 993 (9th Cir. 2007), the case directly on point, the Ninth Circuit Court of Appeals held that under the Sixth Amendment, as applied to the states through the due process provisions of the Fourteenth Amendment, the right to be informed of the charges against one applies to sentencing enhancements. The court noted that the Sixth Amendment right to notice protects the most fundamental right of persons accused of crime to adequately prepare a defense. Gautt, 489 F.3d at 1002-1003 (citing Cole v. Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 2d 644 (1948), In re Oliver, 333 U.S. 257, 273, 68 S. Ct. 499, 92 L. Ed. 2d 682 (1948); and Jackson v. Virginia, 443 U.S. 307, 314, 99 S. Ct, 2781, 61 L. Ed. 2d 560 (1979)). This Sixth Amendment right applies to the states through the Fourteenth Amendment. Cole, 333 U.S. at 201.

The Gautt Court further held that the adequacy of the notice should be determined by looking at the information. Gautt, 489 F.3d at 1003 (citing Cole, at 198, and James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994)).

The court held that the information must apprise the accused of the elements with sufficient clarity to let the defendant know what he must be prepared to defend against. Gautt, at 1003 (citing Givens v. Housewright, 786 F.2d 1378, 1380 (9th Cir. 1986)). Because the defendant was not apprised in the information of the sentencing enhancement, the information was inadequate to charge him with the enhancement.

The holding in Gautt is dictated not only by Cole, In re Oliver and Jackson, but by the holding of the United States Court in Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (200), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), that any fact that increases the punishment for a crime, other than the fact of a prior conviction, cannot be insulated from the protections of the Sixth and Fourteenth Amendments by labeling it a "sentencing enhancement."

The notice requirement of RCW 9.94A.537(1) is constitutionally mandated. Without notice prior to trial of the aggravating factors which the state must prove to the jury, the accused as no means of exercising his or her right to appear and defend at trial.

3. UNDER WELL SETTLED STATE LAW, AGGRAVATING FACTORS, AS EQUIVALENT TO ELEMENTS OF THE CRIME AND SIMILAR TO OTHER SENTENCE ENHANCEMENTS, MUST BE STATED IN THE INFORMATION.

The state argues that, unlike sentence enhancements, aggravating factors need not be charged in the information because a judge may exercise his or her discretion and not impose an exceptional sentence. BOR 24-26. The state, however, cites no authority that a mandatory enhancement is essential to the determination that an element or aggravating factor must be included in the information. To the contrary, the state cites State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86 (1991), for its holding that the purpose of the essential elements rule "is to inform the accused of the nature of the accusation so that he can prepare an adequate defense," not that proof of the element necessarily results in the imposition of a longer sentence. BOR at 24.

Clearly aggravating factors under the SRA and under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), constitute accusations which the state will attempt to prove at trial and which a defendant has a state and federal constitutional right to prepare an adequate defense against. This fact, that the defendant has a right to a jury trial on the aggravating factors necessary for an exceptional sentence,

distinguishes aggravating factors from the penalty provisions of the POAA. See BOR at 24-25. Given that the defendant will face a trial on the aggravating factors, it is hard to credit an argument that the state would be permitted to present evidence of them without notice to the defendant in the information.

Further, there is no significant difference for notice purposes between a deadly weapon or firearm enhancement with mandatory sentences and an aggravating factor. Again, both the sentence enhancement and the aggravating factor will be tried to a jury and the defendant will have to defend against both at his considerable peril. Judges seldom, if ever, decline to impose an exceptional sentence after a jury finding of aggravating circumstances, and the length of the exceptional sentence may greatly exceed the length of an enhancement.

Moreover, in State v. Goodman, 150 Wn.2d 774, 779, 83 P.3d 410 (2004), the court's holding that reference to "meth" in the information was insufficient was premised on the fact that "meth" could refer to different substances which carried different *potential* sentences: "When the identity of the controlled substance increases the statutory maximum of the sentence which the defendant may face upon conviction that identity is an essential element and it must be included in the charging document." The

aggravating factors "increase the statutory maximum" the defendant may face and therefore, under Goodman, are essential elements which must be charged in the information.

As in Goodman, Washington courts have consistently held that "[w]here a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether the factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty." State v. Nass, 76 Wn.2d 368, 370, 456 P.2d 347 (1969). "[I]n order to justify the imposition of the higher sentence, it is necessary that the matter of the aggravating factor relied upon as calling for such sentence be charged in the indictment or complaint." Nass, 76 Wn.2d at 370. "When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information." Theroff, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980) (holding that a deadly weapon allegation must be included in the information).

Aggravating factors must be charged in the information because a defendant has a right to defend against the factor at trial and must have notice that the state will try to prove the factor in order to defend against it. Aggravating factors must be charged in the information because

enhanced penalties can only be imposed if the defendant had notice that the state was seeking enhanced punishment. Without notice, the defendant is deprived of his right to know the "nature and cause" of the allegations against him.

4. IT WOULD VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY TO IMPANEL A JURY TO FIND AGGRAVATING FACTORS TO SUPPORT AN EXCEPTIONAL SENTENCE.

The state's argument is that double jeopardy is not violated by retrial on aggravating factors because Mr. Powell was not acquitted of those factors in an earlier trial. BOR at 26-29. That argument, however, does not address the double jeopardy issue which arises where a defendant remains convicted of a crime, here first degre murder, and is tried on a greater offense, first degree murder with aggravating circumstances. Double jeopardy bars such a second prosecution for a single act for either a greater or lesser offense. Brown v. Ohio, 432 U.S. at 161, 169-170, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

It is beyond dispute that Mr. Powell was convicted of first degree murder, and remains convicted of that offense. Because he remains convicted of first degree murder, the state cannot charge him further for the crime of first degree murder with aggravating circumstances. This

constitutes a second prosecution for a greaer offense and violates the prohibition against double jeopardy.

In additon, retrial on the greater offense is precluded by the mandatory joinder rule. CrR 4.3(1)(b)(3) requires *all* related offenses to be joined for trial; *after trial* the state is precluded from amending an information to charge *any* related offense.

In fact, Mr. Powell was originially charged with "aggravated murder in the first degree (murder in the first degree with aggravating circumstances)" with the aggravating circumstance that the murder was committed during the course of a drive-by shooting. The state did not allege any other aggravating factors. The jury did not find Mr. Powell guilty of premeditated murder and therefore acquitted him of murder in the first degree with aggravating circumstances. He should not be tried for aggravating circumstances which the state could havee against him but elected not to.

Nor should the "ends of justice" provision of the mandatory joinder rule be applied. Many, many defendants are serving sentences imposed in violation of their right to a jury trial without consideration of the ends of justice. The "long line of precedent affirming the exceptional sentencing

scheme in Washington" has benefited the state and does justify excusing them from the dictates of the law.

Trial on the aggravating factors is barred by double jeopardy provisions of the state and federal constitutions and by the mandatory joinder rule.

C. CONCLUSION

Mr. Powell respectfully submits that his case should be remanded for imposition of a sentence within the standard range.

DATED this 11th day of March 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 11th day of March 2008, I caused a ~~true and correct copy of~~ Supplemental Brief of Appellant to be served on the following via prepaid first class mail or my e-mail:

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